IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 16280 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE D.H.WAGHELA Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

1 & 2 YES; 3 to 5 NO

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J.S. BHAGORA - Petitioner(s)
Versus
G.I.D.C. - Respondent(s)

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Appearance :
MS PJ DAVAWALA for Petitioner(s) : 1,
None for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.H.WAGHELA

Date : 23/08/2006

C.A.V. JUDGMENT

1. Invoking Article 226 of the Constitution, the petitioner has approached this Court for a writ, order or direction in the nature of

mandamus directing the respondent to regularise the service of the petitioner with full back wages from the date of termination till his reinstatement. The petitioner was serving as an Assistant under the respondent, i.e. Gujarat Industrial Development Corporation, and a criminal complaint was lodged against him by the respondent employer pursuant to which he was convicted of criminal breach of trust punishable under section 409 read with section section 114 of the Indian Penal Code, 1860 and sentenced to rigorous imprisonment for three years with fine of Rs.5,000/-. He preferred an appeal from that judgment and order dated 31.7.1999 of the learned Judicial Magistrate, First Class, Sabarkantha, Himatnagar. The appellate court, in terms, held that the petitioner was a public servant, that the noting at Exh.61 relied upon by the prosecution as sanction could not be regarded as sanction envisaged under the provisions of the Criminal Procedure Code, 1973 and that, due to absence of such sanction, and without entering into the other issues, the petitioner was acquitted.

2. The petitioner is stated to have thereafter made several representations for reinstatement and, at last, filed the present petition. During the course of the proceedings

before the trial court, the petitioner was issued the show cause notice dated 1.5.2000 wherein it was stated that, in view of the order dated 31.7.1999 of the learned Judicial Magistrate, First Class and under the provisions of Regulation 40-C of the G.I.D.C. (Staff) Regulations, 1963, the service of the petitioner was required to be terminated and he was called upon to show cause as to why such order should not be passed. The petitioner had, in his reply dated 15.5.2000, stated that an appeal had been filed by him on 25.8.1999 which was pending and, therefore, no steps should be taken against him. It is the grievance and allegation of the petitioner that, without considering his pleas and representations, order dated 12.6.2000 to terminate his service with immediate effect under the provisions of Regulation 40-C of the G.I.D.C. (Staff) Regulations, 1963 was made. A copy of that order was not annexed with the petition but subsequently placed on record by the learned counsel Ms.Davawala.

2.1 The said Regulation 40-C, in effect and in substance, carves an exception, in case of conviction on criminal charges, from the normal procedure for imposing penalty, and reads as under:

> **“40-C Special Procedure in certain cases.** *Notwithstanding anything contained in regulation 40-A, where penalty is to be imposed on an employee on the ground of conduct which has led to his conviction on criminal charge and it is considered by the disciplinary authority not expedient to follow the procedure laid down in the said regulation, the disciplinary authority may consider the circumstances of the case and pass such order as it may deem fit.”*

3. It was vehemently argued by learned counsel Ms.Davawala that, once conviction by criminal court was reversed and acquittal was recorded by the appellate court, the basis for termination of service by the employer vanishes and the order of reinstatement must follow as a matter of course. She relied upon the judgment of the Supreme Court in ***Ranchhodji Chaturji Thakore v. Superintendent Engineer, Gujarat Electricity Board [(1996) 11 SC 603,*** which was subsequently followed by the Supreme Court in ***Union of India v. Jaipal Singh [(2004) 1 SCC 121],*** to submit that the court had only denied back wages in such cases where the High Court had already ordered reinstatement. The observations, torn out of context, read as under:

> *“.....Consequent upon his acquittal he is entitled to reinstatement for the reason that his service was terminated on the basis of the conviction by operation of proviso to the statutory rules applicable to the situation. The question of back wages would be considered only if the respondents have*

taken action by way of disciplinary proceedings and the action was found to be unsustainable in law and he was unlawfully prevented from discharging the duties. In that context, his conduct becomes relevant. Each case requires to be considered in its own backdrop....”

*(*emphasis supplied)

3.1 The learned counsel also relied upon the judgment of the Supreme Court in ***Babu Lal v. State of Haryana [(1991) 2 SCC 335]***, wherein it was held that the order of termination had been made illegally during the pendency of the order of suspension and also during the pendency of the criminal proceeding which ultimately ended with acquittal of the appellant. It was stated as the settled position in law that the appellant who was suspended on the ground of pendency of criminal proceeding against him, on being acquitted of the criminal charge, was entitled to be reinstated in service. Those observations have no application in the facts of the present case.

3.2 The judgment of the Full Bench of this Court in ***P.D.Waghela v. G.C.Raiger, Deputy I.G.P. [1993 (2) GLH 1005]*** was relied upon; wherein what the Full Bench was called upon to decide turned on the interpretation that should be put on the expression 'conviction' found in Clause (a) of the second proviso to Clause (2) to Article 311 of the Constitution of India. The question

referred was: *"Would the 'conviction' at the hands of a competent criminal court in the first instance suffice, or should the 'conviction' await confirmation at the hands of a final or ultimate competent criminal court?".* While making passing remarks in the course of discussion, the Full Bench clarified, as under, in para 8:

> *"8. .....Here itself, we must take (sic) the position clear that we are not deciding and pronouncing upon the question as to what will be the fate of the dismissal based on a conviction when that conviction is reversed either in appeal or revision by the higher forum....."*

Therefore, the point in issue in the present petition was expressly excluded from consideration by the Full Bench. However, it is also repeatedly clarified by the Full Bench that its concentration is only on the language of Clause (a) of the second proviso to Clause (2) of Article 311 and they had not traversed beyond that provision and any opinion of the Bench would have relevance only where the service rule or rules are in *pari materia* with the said provisions of the Constitution.

3.3 The learned counsel also relied upon recent judgment of this Court in ***M.K.Panchiwala v. Superintending Engineer (O&M), G.E.B. [2004 (4) G.L.R. 3150]***, wherein it was observed that: *"....it was well settled law that if the employee*

was convicted, the authority could terminate his services; but ultimately, if the conviction was reversed, then the termination order should go”. In the facts of that case, dispute of purely private nature between the brothers and the complainant had resulted into conviction which was set aside at their own instance and the court observed that the employer-Board ought not to have taken a rigid stand, since, admittedly, there was no allegation of misappropriation of funds of the Board against the petitioner and there was no allegation against the conduct of the petitioner by the Board.

4. The pertinent observations, as under, on the subject could be found in the order of the Hon'ble Supreme Court in ***Sulekh Chand and Sulek Chand v. Commissioner of Police (1994) Supp. (3) SCC 674*** :

> *“1. Leave granted.*
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> *2. These appeals arise from the order of the Central Administrative Tribunal in OA No.1218 of 1988 dated 12.12.1993. The appellant was promoted from the post of ASI to SI but he was confirmed w.e.f. 4.1.1989 though it was stated that his case for promotion had to be considered with effect from 1.10.1982. This claim was resisted by the respondents on the ground that in 1983, he was charged for an offence under section 5 (2) of the Prevention of Corruption Act and he was kept under suspension and he was*

also communicated of adverse remarks for the period from 7.6.1980 to 31.3.1981 and that he became eligible to be considered for promotion as SI w.e.f. 16.12.1985. Therefore, his case was considered and he was promoted in 1989. Counsel for the respondent was directed to produce the record relating to the DPC proceedings. We have perused the proceedings of DPC which would clearly show that the reasons which prevailed with the DPC were the prosecution under section 5 (2) of the Prevention of Corruption Act and the departmental enquiry, against the appellant. It is not in dispute that the proposed departmental enquiry also is related to the selfsame offence under section 5 (2) of the Prevention of Corruption Act. The judgment acquitting the appellant of the charge under section 5 (2) became final and it clearly indicates that it was on merits. Therefore, once the acquittal was on merits, the necessary consequence would be that the delinquent is entitled to reinstatement as if there is no blot on his service and the need for the departmental enquiry is obviated. It is settled law that though the delinquent official may get an acquittal on technical grounds, the authorities are entitled to conduct departmental enquiry on the selfsame allegations and take appropriate disciplinary action. But, here, as stated earlier, the acquittal was on merits. The material on the basis of which his promotion was denied was the sole ground of the prosecution under section 5 (2) and that ground when did not subsist, the same would not furnish the basis for DPC to overlook his promotion. We are informed that the departmental enquiry itself was dropped by the respondents. Under these circumstances, the very foundation on which the DPC had proceeded is clearly illegal. The appellant is entitled to the promotion with effect from the date his immediate

junior was promoted with all consequential benefits. The appeals are allowed. No costs."

(underlines supplied)

5. Applying the above propositions of law in the facts of the present case, there is no denying the fact that the alleged offences were committed during the course of employment of the petitioner and conviction was recorded on the basis of the evidence led before the trial Court and tested on the standards applicable for conviction. The order dated 12.6.2000 terminating service of the petitioner on the basis of aforesaid order of conviction dated 31.7.1999 could not be faulted or even challenged till the appeal of the petitioner was decided. As seen earlier, the appeal of the petitioner was allowed on 14.5.2004 only on the ground of supposed want of sanction. Therefore, by no stretch, the acquittal of the petitioner could be said to be on merits. On the other hand, as bare reading of Regulation 40-C reproduced hereinabove indicates, the provisions contained therein are materially different from the provisions of Article 311 insofar as the disciplinary authority is given an option to consider the expediency of following the regular procedure as also of considering the circumstances of the case and pass such order as it may deem fit. It is an admitted position in the facts of this case that the petitioner was

given an opportunity of being heard before his services were terminated, that he was convicted of a serious offence committed during the course of his employment and on the complaint of the employer and that he was acquitted only on the ground of want of sanction supposedly required under the provisions of the Criminal Procedure Code. It must be noted that the issue of proper sanction as required under the Criminal Procedure Code did not appear to have even been raised before the trial Court. The averments made in the petition to the effect that the petitioner is proved to be innocent and that he has no other alternative remedy except to approach this court under Article 226 of the Constitution are incorrect and misleading. The regulations of the respondent Corporation do provide for appeals and review; and such alternative remedies are not resorted to by the petitioner. The petitioner has approached this Court after six years of the impugned order of termination and two years after the judgment in his favour in his appeal.

6. To regard the order of acquittal by the appellate court as proof of innocence of the petitioner would amount to appreciating the form; leaving well alone the substance of the matter. The moot question is: whether the decision and action of the respondent under Regulation 40-C, which was valid at the time it was taken, got

automatically vitiated on acquittal of the delinquent? The basis of the impugned order could be consideration of the circumstances of the case and inexpediency of following the normal procedure in view of conviction on the ground of conduct of the delinquent. Conviction by a criminal court means charges were proved beyond reasonable doubt. Going by the substance of the matter, that did not change on account of acquittal of the delinquent on technical grounds or otherwise than on merits by a higher forum. The proof of guilt beyond reasonable doubt remained on record and its appreciation by an independent judicial forum is also not disturbed by the higher forum. Then to hold a departmental enquiry for the same charges after acquittal and after formally reinstating the delinquent for that purpose after so many years could only be more inexpedient. Therefore, in such cases where the delinquent is convicted of offences for which employer could also have taken disciplinary action, the proper course for the delinquent may be to make an appeal to the employer to review the order of punishment, if there were grounds for some relief; but it may not be just and appropriate for this court, in exercise of its extraordinary jurisdiction, to strike down the order of termination of service only on the ground of reversal of the order of conviction on technical grounds. The extraordinary writ

jurisdiction of the court could be exercised to do justice and not to undo it. As Earl Warren *observed: "It is the spirit and not the form of law that keeps justice alive."*

7. In view of the above factual and legal position, in absence of any statutory provisions or legal right to be reinstated in case of reversal of conviction otherwise than on merits, and no real prejudice having been established in view of clinching evidence of criminal breach of trust before the trial court and in view of the alternative remedy available to the petitioner, this court would not be justified in entertaining the petition in its extraordinary jurisdiction under Article 226 of the Constitution. Therefore, the petition is summarily dismissed with liberty to the petitioner to avail the alternative remedies provided under the provisions of the G.I.D.C. (Staff) Regulations, 1963.

Sd/-

(D.H.WAGHELA, J.)

(KMG Thilake)